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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

INHERENT.COM aka INHERENT, INC., Plaintiff, vs. MARTINDALE-HUBBELL, LEXIS/NEXIS INC. and Does 1 through 200 inclusive, Defendants,	Docket No. C 3:05-cv-03515 MHP **PLAINTIFF'S POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR TRANSFER** Date: October 31, 2005 Time: 2:00 p.m. Dept.: 15

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TABLE OF CONTENTS

I. INTRODUCTION....1

II. STATEMENT OF FACTS....2

III. DISCUSSION....6

1. THE FIRST TO FILE DOCTRINE SHOULD BE DISREGARDED IN LIGHT OF EQUITABLE CONCERNS....6

2. NEW JERSEY DOES NOT HAVE PERSONAL JURISDICTION OVER ICI BASED UPON ITS CONTACTS WITH NEW JERSEY, THUS VENUE IS IMPROPER....7

a. THERE ARE INSUFFICIENT CONTACTS WITH REGARD TO THE MATTERS IN DISPUTE TO JUSTIFY THE EXERCISE OF SPECIFIC OR GENERAL JURISDICTION OVER ICI IN NEW JERSEY....7

i. SPECIFIC JURISDICTION....7

ii. GENERAL JURISDICTION....7

3. NEW JERSEY IS NOT THE MOST CONVENIENT FORUM FOR THIS LITIGATION, AND THIS LITIGATION SHOULD BE TRANSFERRED TO CALIFORNIA OR OREGON....9

4. PLAINTIFF'S COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO FRCP 12(b)(6), AND IF THE COURT FINDS ANY INSUFFICIENCY, PLAINTIFF REQUESTS THAT LEAVE TO AMEND BE GRANTED....9

IV. CONCLUSION....10

TABLE OF AUTHORITIES

Cases

Mann Mfg., Inc. v. Hortex, Inc.
(5th Cir. 1971) 439 F2d 403, 407 6

Mattel, Inc. v. Louis Marx & Co.
(2nd Cir. 1965) 353 F2d 421, 423-424 6

Alltrade, Inc. v. Uniweld Products, Inc.
946 F.2d 622, 625-626 6

Weber v. Jolly Hotels
977 F.Supp. 327 (D.N.J.1997) 8

Helicopteros Nationales de Columbia S.A. v. Hall
466 U.S. 408 (1984) 8

Chrysler Capital Corp. v. Woehling
(D DE 1987) 663 F.Supp. 478, 482 9

Hernandez v. Graebel Van Lines
(ED NY 1991) 761 F.Supp. 983, 990 9

Schmidt v. American Institute of Physics
(D DC 2004) 322 F.Supp.2d 28, 33 9

Pareto v. F.D.I.C.
(9th Cir. 1998) 139 F.3d 696, 699 10

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit
(1993) 507 U.S. 163, 164, 113 S.Ct. 1160, 1161 10

United States v. White
(CD CA 1995) 893 F.Supp. 1423, 1428 10

Neitzke v. Williams
(1989) 490 U.S. 319, 328-329, 109 S.Ct. 1827, 1833 10

Bernheim v. Litt
(2nd Cir. 1996) 79 F.3d 318, 321 10

Jacobson v. Hughes Aircraft Co.
(9th Cir. 1997) 105 F.3d 1288, 1292 10

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I.

INTRODUCTION

This is an action filed by Inherent, Inc. (hereinafter "ICI") against LEXISNEXIS and MARTINDAL HUBBELL (hereinafter "Defendants") to recover damages pursuant to its requests that ICI refrain from business operations, particularly collecting on existing accounts and selling new accounts. At the outset, it must be pointed out that REED (the parent company of Defendants) filed a pre-emptive action in New Jersey; this action was filed after ICI stated that they wanted to discuss the matter and intended to file suit by July 18, 2005. Instead of discussing the matter, Defendants brought the New Jersey suit. This action was filed in New Jersey State Court as an offensive tactic to bludgeon a small business into submission.

Also, it must be pointed out that ICI is a web-based business, involved in the production and development of web-sites. Therefore, no physical services are being rendered to MH in New Jersey.

ICI has moved its offices to San Francisco, California as evidenced by the business license attached to the supplemental declaration, as well as the declaration of Debra Kamys.

ICI responds to the points raised by Defendants as follows:

II.

STATEMENT OF FACTS

Defendant and ICI had entered into a negotiation whereby Martindale-Hubbell would purchase ICI, and give a number of long-term employees jobs with Martindale-Hubbell.

During the course of negotiations, Martindale-Hubbell entered into an agreement with ICI that the business would be purchased for a total sum of $930,000 plus the hiring of key employees as stated above. The negotiations were instigated by Martindale-Hubbell, as Martindale-Hubbell sought out ICI about the purchase. A contract was entered into setting forth that after due diligence, all contingencies would be removed and the contract would be confirmed. On June 16, 2005, Martindale-Hubbell removed all contingencies and sent employees to Portland, Oregon to look through the financial records, client contracts, programming source code, network operations, and other relevant information. All the activities surrounding the agreement to which Martindale-Hubbell is seeking declaratory relief took place in Portland, Oregon.

Defendant ICI believes that Martindale-Hubbell took the above actions with intent to defraud ICI out of trade secret information to obtain an unfair competitive advantage in their own business of creating websites for law firms throughout the United States, without the intent to purchase ICI.

ICI had a previous business relationship with MH prior to the facts surrounding this action filed by MH. See Dec. of Debra Kamys at par. 3.

The Alliance Agreement referred to in the declarations of Michael Little and Timothy Corcoran is no longer in effect as to ICI and MH. See Dec. of Debra Kamys at par. 4. The dispute which is the subject of this action does not arise out of any services performed or contemplated under the Alliance Agreement between ICI and MH. See Dec. of Debra Kamys at par. 5. The services performed since 2002 have nothing to do with the declaratory relief action filed by Plaintiff. See Dec. of Debra Kamys at par. 6.

No agreement existed between the parties identifying that any disputes surrounding the potential sale of ICI's assets to MH would be litigated in New Jersey. This term was never agreed upon by ICI, and never would be, because traveling the distance from where ICI is incorporated and practices business to New Jersey would be unduly expensive to protect ICI's interests in the face of a dispute. See Dec. of Debra Kamys at par. 7.

In addition, ICI has moved its principal place of business to California, and did so in early July, prior to the filing of REED's complaint on July 18, 2005. This move is reflected by the business registration certificate of ICI to practice business in San Francisco attached hereto as Exhibit A. All of ICI's documents relevant to the facts in dispute are located in California. See Dec. of Debra Kamys at par. 8.

ICI does no substantial business in New Jersey. Based upon the contacts ICI has with New Jersey, it was not anticipated that ICI would have to litigate in the State of New Jersey. See Dec. of Debra Kamys at par. 9.

The relevant agreements to this action, including the Non-Disclosure Agreement and Letter of Interest, were executed by ICI in Oregon. Furthermore, MH's representative signed the Non-Disclosure Agreement while in Oregon, during meetings MH had requested to discuss its potential acquisition of ICI. See Dec. of Debra Kamys at par. 10.

MH traveled to Portland, Oregon, in November of 2004 and in February 2005, then again in June of 2005. ICI and MH also met in Phoenix in May. The only trip made by a representative of ICI to New Jersey, with respect to the facts at issue, was at the request of MH, and paid for by MH. See Dec. of Debra Kamys at par. 11.

Communications regarding the acquisition of ICI by MH went both ways. MH sent voluminous amounts of e-mails, and made numerous phone calls to Portland, Oregon, regarding this acquisition. MH sent voluminous amounts of e-mails, and made numerous phone calls to Portland, Oregon from New Jersey, regarding this acquisition. See Dec. of Debra Kamys at par. 12.

Regarding the facts presented by MH's decision to terminate the purchase negotiations with ICI, contained in paragraph 14 of the declaration of Michael Little, ICI responds as follows (see paragraph 13):

a. As to point (i) MH had full knowledge of ICI's technology well prior to the execution of the Letter of Interest based upon disclosures made on 11/2/04 to MH's representatives (Michael Little, Carlton Dyce, and others) during their visit to ICI; furthermore, written documentation of ICI's technology systems was provided on 5/17/05, with no changes being made between that date and the dates of the formal "Due Diligence" visit to Portland, Oregon in June 2005; MH had ample time to withdraw from negotiations prior to the June 2005 visit if concerns about ICI's technology were serious;

b. As to point (ii) the financials of ICI were disclosed in writing to MH in February of 2005 and then again on 6/8/05. Both disclosures were made prior to the formal "Due Diligence" on-site visit to ICI in Oregon in June of 2005, and ample time was allowed for MH to withdraw from negotiations if concerns about ICI's financial situation were serious. Of specific note, the negotiations for acquisition were limited to the purchase of ICI's assets, not liabilities, and this was discussed between the parties;

c. As to point (iii) ICI had disclosed its client list to MH on 6/8/05; ample time was allowed for MH to withdraw from negotiations if concerns about ICI's client list were serious; and

d. As to point (iv) there was no danger as to the employees of ICI competing with the interest of MH. These agreements could have been obtained with little effort, and had already been agreed to by the employees of ICI. MH did not offer ICI the opportunity to remedy the situation by obtaining said agreements. In addition, ICI lost its Chief Technology Representative, Mark Holm, referred to in the declaration of Michael Little, due to the bad feelings caused by the negotiations with MH; Mark Holm is in the business of **Information Technology**, not Web Services, which are the subject of the agreement between ICI and MH.

These points are also contained in correspondence, attached as Exhibit B, sent to MH in July 2005 in an attempt to informally resolve the issues surrounding the potential lawsuit prior to MH's filing of the instant retaliatory lawsuit.

During the time that the elements in MH's Letter of Interest were discussed/negotiated, ICI requested earnest money to be paid by MH in the event that the transaction was not completed. MH responded that they would go "one better" by paying the purchase price in two installments instead of the originally-proposed three installments. ICI has evidence of this conversation. See Dec. of Debra Kamys at par. 14.

The majority of ICI's witnesses to the relevant transaction are located on the West Coast, in either Oregon or California. Debra Kamys and her husband Jeffrey, who are witnesses to the events surrounding the potential acquisition of ICI by MH, are located in California. At least seven other relevant witnesses are located in Oregon (Charles Van Rossen, David Heinen, Mark Holm, William Weigel, Kary Boothroyd, Matt Hickerson and Chris Roberts), as well as Renée Sweany, who is located in Indiana. See Dec. of Debra Kamys at par. 15. With respect to the electronic communications, all of these communications are accessible anywhere in the country. See Dec. of Debra Kamys at par. 16.

MH's Letter of Interest included a requirement that ICI not sell any products or services to "lawyers, law firms or bar associations or others acting on behalf of those types of customers" for the duration of the Due Diligence period. MH terminated negotiations on 6/28/05, so ICI was put in a position of having very low sales allowed for nearly five weeks. This has been extremely damaging to the business of ICI, as it is now very behind in collecting monies from its clients. As a result, ICI is not in a financial position to travel to New Jersey for litigation. See Dec. of Debra Kamys at par. 17.

Based upon the above, it would be extremely expensive and burdensome for ICI to litigate in a distant state, particularly when the facts surrounding the transaction demonstrate that the majority of efforts surrounding were taken outside of New Jersey, and in Portland, Oregon. Due to the fact that two key individuals from ICI – along with the business headquarters including documents, etc. – have moved to San Francisco, Plaintiff has requested a change of venue to California in the New Jersey litigation. See Dec. of Debra Kamys at par. 18.

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III.

DISCUSSION

1. THE FIRST TO FILE DOCTRINE SHOULD BE DISREGARDED IN LIGHT OF EQUITABLE CONCERNS.

First, the lawsuit was filed by REED in New Jersey as a preemptive strike, while they were well aware that ICI was considering the filing of suit. To allow Defendants the benefit of this rule despite this conduct to forum shop the action in New Jersey, would be against the policy of encouraging the informal resolution of disputes.

A court may decline to apply the 'first-filed' rule if there are sufficiently compelling circumstances; e.g., where it is shown that *forum-shopping alone* motivated the choice of the situs for the first suit. See Mann Mfg., Inc. v. Hortex, Inc. (5th Cir. 1971) 439 F2d 403, 407; Mattel, Inc. v. Louis Marx & Co. (2nd Cir. 1965) 353 F2d 421, 423-424.

As set forth in the declaration of Debra Kamys, ICI made a request, by way of correspondence attached to the Declaration of Debra Kamys as Exhibit B, that the matter be discussed informally and that in the event that no response was made by July 18, 2005, that a suit would be filed. Instead of attempting to discuss the matter, REED filed suit in New Jersey state court. This activity should be disfavored because it discourages the informal resolution of disputes between parties, and therefore, the 'first to file' rule should be disregarded.

Further, the 'first to file' rule requires that the issues in both cases be the same. Alltrade, Inc. v. Uniweld Products, Inc. 946 F.2d 622, 625-626. In the California action, the issue of damages suffered by ICI is also sought to be pursued. These damages are the result of the tortuous conduct of Defendants and are not dependent upon whether or not any contract for the sale of ICI was valid or not. Further, these are issues that do not arise under the non-disclosure agreement, so no argument can be made that New Jersey law would even apply to this action.

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2. NEW JERSEY DOES NOT HAVE PERSONAL JURISDICTION OVER ICI BASED UPON ITS CONTACTS WITH NEW JERSEY, THUS VENUE IS IMPROPER.

a. There Are Insufficient Contacts With Regard To the Matters In Dispute To Justify The Exercise Of Specific or General Jurisdiction Over ICI in New Jersey.

i. Specific Jurisdiction -

First of all, MH sent numerous representatives to Portland, Oregon, in November of 2004 and again in February and June of 2005. ICI and MH also met in Phoenix in May. The only trip made by a representative of ICI to New Jersey, with respect to the facts at issue, was at the request of MH, and paid for by MH. See Declaration of Debra Kamys at paragraph 11. Further, communications regarding the acquisition of ICI by MH went both ways. MH sent voluminous amounts of e-mails, and made numerous phone calls to Portland, Oregon, regarding this acquisition. See Declaration of Debra Kamys at paragraph 12.

As such, the majority of the events which led up to the action filed by REED, took place outside of New Jersey, and in Portland, Oregon. Based upon these facts, no specific jurisdiction exists over ICI.

Secondly, any exercise of jurisdiction over ICI in New Jersey would be unreasonable. This is based upon the fact that the instant action was filed in New Jersey in efforts to prejudice ICI by bringing suit in a distant forum. These discussions were instigated by Martindale-Hubbell (hereinafter "MH"), and MH traveled, by way of numerous representatives, to Portland, Oregon 3 times regarding the transaction in dispute.

REED, in its papers, refers to the Alliance Agreement containing the provision regarding Arbitration of disputes under the agreement taking place in New Jersey; however, counsel and the declaration of Timothy Corocan both state that the Alliance agreement was terminated as of 2002. See Declaration of Timothy Corocan, paragraph 8. Second, this is not an action brought under the Alliance Agreement.

ii. General Jurisdiction –

With regard to the issue of 'general' jurisdiction, to assert general jurisdiction, a plaintiff must demonstrate that the defendant's contacts with the forum are so "continuous and substantial" that the defendant should "expect to be haled into court on any cause of action." See

Weber v. Jolly Hotels, 977 F.Supp. 327 (D.N.J.1997) (citing Helicopteros Nationales de Columbia S.A. v. Hall, 466 U.S. 408 (1984)). Merely because ICI has done business with MH in the past, and still conducts some business with MH, this should not support a finding of general jurisdiction. MH has terminated the Alliance Agreement by its own admission, and this dispute is not over any of those matters, but over an agreement initiated by MH in Portland Oregon. Therefore, ICI's contacts with New Jersey should not be considered 'continuous and substantial' to allow an assertion of 'general' personal jurisdiction in this case.

Further, given that ICI is in the business of providing web-based services, any contacts with New Jersey are minimal; ICI does not travel to New Jersey for the purpose of maintaining web-sites, but performs these operations on the Worldwide Web. ICI does not sell products within the state of New Jersey either. As such, this is a novel scenario, and at a minimum, the contacts with MH should be considered insufficient to allow MH to convert a cause of action specifically arising in Portland, Oregon, to one where personal jurisdiction exists in New Jersey.

MH's Letter of Interest included a requirement that ICI not sell any products or services to "lawyers, law firms or bar associations or others acting on behalf of those types of customers" for the duration of the Due Diligence period. MH terminated negotiations on 6/28/05, so ICI was put in a position of having very low sales allowed for nearly five weeks. This has been extremely damaging to the business of ICI, as it is now very behind in collecting monies from its clients. As a result, ICI is not in a financial position to travel to New Jersey for litigation. See Declaration of Debra Kamys, at paragraph 17.

Further, it would be extremely expensive and burdensome for ICI to litigate in a distant state, particularly when the facts surrounding the transaction demonstrate that the majority of efforts surrounding were taken outside of New Jersey, and in Portland, Oregon. Due to the fact that two key individuals from ICI – along with the business headquarters including documents, etc. – have moved to San Francisco, we have requested a change of venue to California in the New Jersey action. See Declaration of Debra Kamys, at paragraph 18.

The above militates that no personal jurisdiction should be found as to the matters in dispute, or based upon ICI's 'general' contacts with New Jersey.

3. NEW JERSEY IS NOT THE MOST CONVENIENT FORUM FOR THIS LITIGATION, AND THIS LITIGATION SHOULD BE TRANSFERRED TO CALIFORNIA OR OREGON.

As stated above, this is an action brought by REED in New Jersey State Court for the purpose of prejudicing ICI.

With reference to the issues presented in the instant application for a transfer, if the forum has significant contacts with the activities alleged in the complaint, the plaintiff's choice of forum will be given substantial weight. Chrysler Capital Corp. v. Woehling (D DE 1987) 663 F.Supp. 478, 482; see also Hernandez v. Graebel Van Lines (ED NY 1991) 761 F.Supp. 983, 990; Schmidt v. American Institute of Physics (D DC 2004) 322 F.Supp.2d 28, 33.

The majority of ICI's witnesses to the relevant transaction are located on the West Coast, in either Oregon or California. Debra Kamys, and her husband Jeffrey Kamys, who are witnesses to the events surrounding the potential acquisition of ICI by MH, are located in California. At least seven other relevant witnesses are located in Oregon (Charles Van Rossen, David Heinen, Mark Holm, William Weigel, Kary Boothroyd, Matt Hickerson and Chris Roberts), as well as Renée Sweany, who is located in Indiana.

With respect to the electronic communications, all of these communications are accessible anywhere in the country. See Declaration of Debra Kamys at paragraph 15-16.

Further, California has an interest in adjudicating a dispute involving a business within the state. This is a dispute between a New Jersey based company and a business with its principal place of business in California.

In addition, all of ICI's documents which were the subject of this agreement to purchase ICI by MH are in California at present. All of ICI's witnesses are located outside of New Jersey. Therefore, the most convenient forum, and the forum most centrally related to matters in dispute would be either California or Oregon.

4. PLAINTIFF'S COMPLAINT SHOULD NOT BE DISMISSED PURSUANT TO FRCP 12(b)(6), AND IF THE COURT FINDS ANY ISUFFICIENCY, PLAINTIFF REQUESTS THAT LEAVE TO AMEND BE GRANTED.

In reviewing a Rule 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as *reasonable inferences* to be drawn from them. Pareto v. F.D.I.C.

(9th Cir. 1998) 139 F.3d 696, 699; see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit (1993) 507 U.S. 163, 164, 113 S.Ct. 1160, 1161; United States v. White (CD CA 1995) 893 F.Supp. 1423, 1428 (quoting text).

The sole issue raised by a Rule 12(b)(6) motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, no matter how improbable the facts alleged are, they must be accepted as true for purposes of the motion. Neitzke v. Williams (1989) 490 U.S. 319, 328-329, 109 S.Ct. 1827, 1833; Bernheim v. Litt (2nd Cir. 1996) 79 F.3d 318, 321--'Recovery may seem remote and unlikely on the face of the pleading, but that is not the test for dismissal'; Jacobson v. Hughes Aircraft Co. (9th Cir. 1997) 105 F.3d 1288, 1292--'court's role at the 12(b)(6) stage is not to decide winners and losers or evaluate the strength or weakness of claims.'

Defendants state that the allegations contained in the Complaint do not set forth specific facts substantiating fraud. If the Court agrees with Defendants, Plaintiff requests that an opportunity be allowed to amend, as facts do exist which substantiate the claims of fraud. See Declaration of Debra Kamys generally.

IV.

CONCLUSION

This Court should not transfer this action, but if it so elects, it should transfer the same to Oregon. REED filed the instant retaliatory action to work a prejudice upon ICI, by causing it to defend an action in a distant forum, on a contract that was entered into in Oregon. Therefore, either of these two forums should have a greater interest in this dispute.

Personal jurisdiction should not be found by this Court in New Jersey given that there are no substantial contacts with the forum and ICI, and the matters in dispute occurred in Oregon. Also, given that MH sent representatives to Oregon 3 times during negotiations of the agreement in dispute, it can hardly be asserted now that it is an inconvenient forum for MH.

Finally, the one trip made to New Jersey should be disregarded based upon the fact that MH paid for the trip. ICI will suffer extreme hardship if forced to travel to New Jersey to defend this lawsuit. Therefore, fairness would dictate that a West Coast forum would be more appropriate.

Dated: 10/10/05

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